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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1470

ALTON J. LEMON, ET AL., *Appellants,*

v.

DAVID H. KURTZMAN, ET AL., *Appellees.*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, Appellees David H. Kurtzman, *et al.*, move that the final judgment and decree of the District Court be affirmed on the ground that the question is so insubstantial as not to warrant further argument.

QUESTION PRESENTED

May Pennsylvania, pursuant to the Pennsylvania Nonpublic Elementary and Secondary Education Act of 1968, reimburse religiously affiliated schools for services which they performed under contracts with the Commonwealth during the school term 1970-1971, the contracts having been entered into in good faith reliance upon a determination by the district court that the Act was constitutional, and the schools having rendered instructional services, expended funds, adjusted curriculum and undertaken administrative changes in order to fulfill the requirements of the Act?

STATEMENT

On June 19, 1968, Act 109, authorizing the Secretary of Education to enter into contractual relationships with nonpublic schools for the purchase and sale of secular educational services, became law. The Commonwealth then established an office for administering the Act, promulgated regulations, convoked an Advisory Board of educators to consult as to the Act's operation and commenced entering into contractual relationships with approximately 1181 nonpublic schools throughout the state pursuant to the provisions of the Act.

On July 18, 1968, the Plaintiffs announced to the news media that they were challenging the constitutionality of the Act. However, only on June 3, 1969, a year after the Act had been in operation, did they file their Complaint. Thus the program had already become fully established, Pennsylvania's nonpublic schools having by this time expended funds, adjusted curriculum and undertaken administrative changes in

reliance upon the continuing operation of the Act and for the purpose of receiving its benefits.

Following full briefing and oral argument, the District Court, on November 28, 1969, held the Act to be constitutional. See *Lemon* v. *Kurtzman*, 310 F. Supp. 35 (E.D., Pa. 1969).

After that date, specifically on January 15, 1970, the nonpublic schools formally renewed their contracts with the Commonwealth under Act 109 for the coming school year 1970-1971. Payments to the schools under these contracts were, by the terms of the Act, due in four equal installments beginning on September 1, 1971, as reimbursement for services performed by the schools from September 1, 1970, to the end of the school year in June, 1971. The District Court expressly recognized that the "contracts" to which Act 109 refers were actually contracts as a matter of general law (*id.* at 39), creating obligations both upon the Commonwealth and the schools. The schools, during the 1970-1971 term, rendered a total of 5,186,160 hours of instruction to Pennsylvania children in the subject areas covered by the Act and in performance of their specific contract obligations. They likewise expended considerable sums in administrative costs specially necessitated by their assumption of those obligations. All of this was in specific reliance upon the constitutional validity of the Act.

On June 28, 1971, after the expiration of the 1970-1971 school term, the Supreme Court of the United States, upon appeal from the district court decision, reversed. *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). On remand, pursuant to that decision, the District Court entered summary judgment in favor of plaintiffs

(Appellants herein) and restrained payments to church-related schools for services performed or costs incurred subsequent to June 28, 1971, thus (over the plaintiffs' objection) leaving the payments for the school year prior to that date unaffected by the injunction. The plaintiffs filed Notice of Appeal with this Court on January 11, 1972. On February 22, 1972, they secured from the Court below an Order for an Injunction Pending Appeal, enjoining the payments in question for a period of 90 days. This Order was accompanied by an Opinion of the Court, setting forth its reasons for permitting the 1970-1971 payments to be made, as well as its reason for granting the injunction pending appeal. The time for docketing the appeal was extended by Order of Mr. Justice Brennan, until May 10, 1972.

ARGUMENT

The principal arguments which the Appellants raise in their Jurisdictional Statement they also presented to the court below. Unanimously, the three-judge court rejected those arguments in its Opinion, which is hereto attached as Appendix A.

The decision of the District Court is plainly correct, and the Opinion a complete answer to the contentions of Appellants. Appellants nevertheless attack it as erroneous with respect to its conclusions concerning what the Supreme Court held in *Lemon* v. *Kurtzman* and with respect to retroactive application of a decision invalidating a statute.

Appellants contend that Pennsylvania's making of reimbursement payments for the 1970-1971 school year would necessitate "the kind of entangling inquiry and

surveillance of religious and church related schools that was expressly forbidden by this Court in *Lemon* v. *Kurtzman.*" (Jurisdictional Statement, 10). The Court below rejected this argument, properly pointing out that, by the issuance of the permanent injunction, restraining future payments under the Act, "the statutory scheme which fostered the excessive entanglement between the state and religion has been dissolved." (App. A-6). The Court reasoned:

> "Since the potential for any future state intrusion into the religious domain has been eliminated, reimbursement for expenditures made prior to the Supreme Court's decision would in no way run afoul of that ruling." *Ibid.*

The Supreme Court, in discussing the question of "entanglement" between government and religion in *Lemon* v. *Kurtzman,* was careful to stress that the term "entanglement" is descriptive of a *relationship,* that "all the circumstances of a particular relationship" must be examined in the inquiry as to whether the relationship is forbidden, and that to determine whether the entanglement is excessive, "the resulting relationship between the government and the religious authority" must be examined. *Id.* at 614, 615.

What "resulting relationship" would be the product of payment of the old debt under the now voided Act? The mere terminating of the relationship created by the Act through payments of the moneys earned certainly cannot be said to bring into prospect any relationship bearing the characteristics which this Court described in *Lemon* as improper—*e.g.,* "comprehensive, discriminating, continuing", "sustained and detailed administrative relationships for enforcement of

statutory or administrative standards", "an intimate and continuing relationship." *Id.* at 619, 621, 622.

The District Court was also correct in its refusal to bar payment of the moneys already earned. While Appellants infer that the contracts in question were merely "window dressing" for a subsidy, it is clear that the arrangements in question are contracts under Pennsylvania law.[1] There can be no doubt that contract rights became vested in the schools at the time the contracts were made. The District Court correctly held that, where rights become vested in reliance on a judicial decision, those rights will not be disturbed upon a subsequent overturning of that decision, especially where hardship would result.

The Appellants prove nothing by their assertion that, when the contracts were entered into, "the Act was under direct constitutional attack." Of course it was. It begs belief, however, to conclude from that that the financially plagued schools—in the face of the District Court decision upholding the Act—should have stopped contracting merely because the Appel-

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[1] Pennsylvania law requires only that the promisor suffer a "trifling inconvenience", to support a binding promise (*Mikos* v. *Kida*, 314 Pa. 561 (1934); *York Metal & Alloys Co.* v. *Cyclops Steel Co.*, 280 Pa. 585 (1924); *Stearns* v. *Targe*, 34 D. & C. 2d 399, 52 Del. Co. 96 (1964). The benefit to the Commonwealth and the detriment to the participating schools is: the Act's requiring the use of non-sectarian books, the testing requirements for their students and the promise to hire teachers possessing the qualifications required for certification by the Commonwealth. Moreover, Pennsylvania courts have repeatedly sustained contracts in which a party rendering services to another voluntarily can enforce an express promise made by the recipient of the services that they shall be paid for if the services are continued. See *e.g.*, *Sutch's Estate*, 201 Pa. 305 (1901); *Currey's Estate*, 26 Pa. Super. 479 (1904); *Pohl's Estate*, 136 Pa. Super. 91 (1939).

lants filed an appeal. Certainly the school's reliance on the validity of the Act would have been well founded absent that decision, merely on the ground that their state legislature, the Pennsylvania Attorney General and the Governor of the Commonwealth had all attested to the constitutionality of the Act. Furthermore, there were two parties to the contracts, the Commonwealth being the other signatory, and the schools could reasonably have concluded that if the Commonwealth could rely upon the statute, so indeed could they.

The lower court's application of the doctrine respecting retroactivity finds ample justification not only in the decisions of this Court (cited in the lower court's Opinion) but also in the decisions of the courts of Pennsylvania. See, *DeMartino* v. *Zurich Insurance Company*, 307 F. Supp. 574 (W.D. Pa., 1969), stating the Pennsylvania rule to be:

> " 'A decision reversing or overruling a prior decision as to the construction of a statute is generally retrospective in its operation and relates back to the enactment of the statute, or to the date of the overruled decision', *unless vested rights are acquired in reliance on the overruled decision* . . . This is the Pennsylvania Rule." *Id.* at 573 (Emphasis supplied).

See also *Buradus* v. *General Cement Products Company*, 159 Pa. Super. 502 (1946), aff'd 256 Pa. 349 (1947); *Ray* v. *Natural Gas Company*, 138 Pa. 576 (1891); *Commonwealth* v. *Garrett*, 425 Pa. 594 (1967).

Clearly this case calls for the application of the equitable doctrine enunciated by the Supreme Court. It is true that, in invoking equitable doctrine, the Court should balance the equities. It thus may weigh

the equities of the Commonwealth of Pennsylvania and its nonpublic schools against the equities of the Appellants in this case, Alton J. Lemon, Priscilla Reardon, Betty J. Worrell and the several Appellant organizations. Appellants fail to demonstrate how the question of payment would remotely affect them. Non-payment would not restore any religious liberty which they claim has been denied to them. Indeed, they would not be enttiled to one cent of the withheld funds. Their lives and liberties would be totally unaffected. They fail to demonstrate how they would actually suffer in any manner if the money were not paid out. In short, it is difficult to understand the motivation of the Appellants in insisting on the denial of the equities which are so plainly now possessed by the schools.

On the other hand, non-payment of the money imposes an extreme burden on the schools, the children enrolled therein and their parents. As pointed out previously, the schools have already expended the money in good-faith reliance upon the statute and in good-faith performance of their obligations. Despite the contention that they made no substantial change in their position in reliance on the Act, the fact is that the schools undertook considerable expense for administrative changes required by the Act. Furthermore, they rendered instructional services which they could not otherwise have provided. To now deprive them of the payment of the debts they are owed would be to work an extreme hardship to those schools, to children, their parents, as well as to education throughout the State.

We respectfully submit that the Appellants present no substantial question for the decision of this Court,

and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

WILLIAM B. BALL
JOSEPH G. SKELLY
127 State Street
Harrisburg, Pennsylvania 17101
Attorneys for Appellees Archbishop Wood High School for Girls, Germantown Lutheran Academy, Akiba Hebrew Academy and Beth Jacob Schools of Philadelphia

JAMES E. GALLAGHER, JR.
C. CLARK HODGSON, JR.
1300 Two Girard Plaza
Philadelphia, Pennsylvania 19102
Attorneys for Appellees St. Anthony's School and Holy Ghost School

Of Counsel:

WILLIAM D. VALENTE
Villanova, Pennsylvania 19085

STRADLEY, RONON, STEVENS & YOUNG
Philadelphia, Pennsylvania 19102

J. SHANE CREAMER
Attorney General
State Capitol
Harrisburg, Pennsylvania
Attorney for Appellees David H. Kurtsman, et al., Commonwealth of Pennsylvania

SAMUEL RAPPAPORT
1324 Walnut Street
Philadelphia, Pennsylvania 19107
Attorneys for Appellees Akiba Hebrew Academy and Beth Jacob Schools of Philadelphia

F. RAYMOND HEUGES
Philadelphia National Bank Building
Philadelphia, Pa. 19107
Attorney for Appellee Germantown Lutheran Academy